Supreme Court, U.S.
FILED

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No.

In the
Supreme Court of the United States

GARY H. PALM,

Petitioner,

v.

RODERICK R. PAIGE, SECRETARY OF EDUCATION,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The District of Columbia

PETITION FOR A WRIT OF CERTIORARI

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37 pp

QUESTIONS PRESENTED

1. Whether the initial complaint need only allege an injury caused by the government defendant's actions to establish Article III standing at the pleading stage or whether the initial complaint must contain allegations that establish every element of Article III standing that must be proved at trial.

2. Whether allegations that the Department of Education ordered the ABA to eliminate the House of Delegates from making any accreditation decisions is sufficient to show causation at the pleading stage or whether a third party's (ABA) compliance with the Government Defendant's orders precludes Article III standing at the pleading stage.

3. Whether de novo review of dismissal of a complaint for lack of standing must consider all subsidiary facts that can be imagined to be included within the facts alleged.

4. Whether a member of a not-for-profit corporation has standing to obtain a declaratory judgment that the Government's orders are invalid when the corporation refuses to challenge these orders and Petitioner has tried to challenge them in other proceedings.

5. Whether Petitioner who has alleged dilution of his vote as an ABA member by the Government's actions must show that reinstating his voting strength would actually result in actions favorable to his interests or is it enough that there be a significant vote dilution caused by the Government's action that is being challenged.

6. Whether the Circuit Court of Appeals' triage system that allows a Staff Lawyer to decide to treat a case as one likely for disposition without oral argument and relies on a draft of the final order prepared by a staff lawyer before the first brief is due to be filed is unconstitutional and violates the accepted and usual course of proceedings.

7. Whether the Circuit Court of Appeals and the District Court departed from the accepted and usual course of judicial proceedings by not allowing Plaintiff to file even one amended complaint when it used a strict evidentiary standard to evaluate the allegations of the complaint with respect to Article III Standing.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review a decision of the United States Court of Appeals for the District of Columbia.

OPINIONS AND ORDERS BELOW

The Court of Appeals issued its Judgment on August 9, 2002 (App.1) and its per curiam Order upon denial of the Petition for Rehearing and Rehearing En Banc on November 7, 2002. (App. 3)

The District Court issued its Memorandum Opinion on September 4, 2001 dismissing the Complaint with Prejudice, *Palm v. Paige*, 161 F. Supp. 2d 26, 2001 U.S. Dist. LEXIS (2001). (App. 4)

The District Court also entered orders dated October 30, 2001 and November 20, 2001 denying Plaintiff's Motion for Reconsideration of Order Dismissing Complaint with Prejudice and denying Plaintiff's Motion for Leave to file First Amended Complaint. (Appendix)

JURISDICTION

(1) The Court of Appeals Judgment was entered on August 9, 2002.

(2) The Petition for Rehearing and Rehearing En Banc was denied on November 7, 2002.

(3) Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The following Constitutional and Statutory Provisions are set out in the separate Appendix.

Federal Rules of Civil Procedure

a. Rule 8
b. Rule 9
c. Rule 15
d. Rule 58

Higher Education Act, 20 U.S.C. § 1099b

Department of Education Regulations relating to Accrediting Bodies, 34 CFR 602

STATEMENT OF THE CASE

The Circuit Court for the District of Columbia affirmed the dismissal of Petitioner's complaint on the grounds that his complaint did not allege the elements of proof required to show Article III Standing. Petitioner's complaint had challenged the legality of the Department of Education regulations as applied to the American Bar Association. Jurisdiction was asserted under 28 U.S.C. § 1331.

I. FACTUAL BACKGROUND

The Highest Courts of all fifty states use the American Bar Association as the accreditation authority for graduates of American law schools to sit for the bar. Since at least 1952 until the action of the Department of Education complained of in this case, the House of Delegates was the final decision maker on the accreditation of schools and determining accreditation standards. It acted upon recommendations of the Council of the Section of Legal Education and Admissions to the Bar. In the 1970's and 1980's criticism grew in many quarters that the ABA was no longer in control and that the influence of the deans and professors over the Council had reached the level of effective control and was being exercised unfairly and without regard to educational validity and reliability. New law schools were being held to higher standards to keep out competition. Others were concerned that there seemed to be discrimination against religiously affiliated schools and schools that use non-traditional teaching methods like clinical education or were teaching centered rather than research-oriented.

A. DOJ Filed An Anti-Trust Complaint Alleging That The Academics And Deans Of Regulated Schools Had "Captured" The Accreditation Process

In the early 1990's, the Justice Department investigated and concluded that a "guild" of law school deans and academics had "captured" actual control of the ABA's accreditation system in violation of the anti-trust laws. (labels used by DOJ). The complaint alleged that the ABA had fixed law school faculty salaries and had tried to suppress competition from law schools that were not approved by the ABA. Competitive Impact Statement, *USA v. ABA,* 60 Fed. Reg. 39421 (1995).

The Department of Justice's Anti-Trust Division in its competitive impact statement filed with the Consent Decree found that the Council had committed Anti-trust violations. The antitrust case against the ABA has been summarized well as follows:

> "The government's case alleged that the law school accreditation process had been captured by legal educators and that the ABA, under these educators influence, formulated and enforced anticompetitive standards and engaged in a group boycott of schools failing to achieve those standards. The case was eventually terminated with a consent decree in which the ABA agreed to discontinue a few of the challenged practices and alter the composition of the committees and organizations that control the accreditation process in order to reduce the legal educators' role in the process." Marina Lao, Discrediting Accreditation: Antitrust and Legal Education, 79 Wash. U. L.Q. 1035, 1043-44. (2001).

The Anti-Trust Division concluded that the "capture" was accomplished through the use of the Discounted Group Membership Program open only to accredited schools to pay for all their faculty and administrators to join the Section and elect the members of the Council. Thereby, the accredited schools and their large contingent of academic faculty control nearly 90% of the voting members of the Section. DOJ found that the result was a

conspiracy to raise law faculty salaries through the accreditation process, among other conclusions.

Final decision making authority of the House of Delegates on accreditation and oversight supervision of the Council and the Legal Education Section was expanded as part of the Decree. Complaint ¶13. (Appendix)

B. The Department of Education Approved The Consent Decree Before It Was Entered.

Prior to entry of the Consent Decree, the Department of Education informed the parties, the trial judge and the public that the Consent Decree did not violate its regulations. Complaint ¶13. (Appendix) Specifically DOE informed the Court in writing that the role of the House of Delegates set out in the Consent Decree was in compliance with DOE's "separate and independent" regulations, the regulations at issue here. Complaint ¶14. (Appendix)

C. The Department of Education "Discovers" After 45 Years Of Regulation That The House of Delegates Makes The Final Accreditation Decisions.

Some time later, without advising the Court, the Department of Education changed its opinion and concluded to the surprise and amazement of many that the Consent Decree violated its "separate and independent" regulations. DOE employees claimed that they now realized for the first time in all the years of reviewing the ABA since the 1950's, that the House of Delegates was the final decision making authority. Complaint ¶15. (Appendix)

The Department of Education succeeded in imposing its will to maintain faculty control of accreditation over the Department of Justice. The ABA, DOE and DOJ acted to diminish the role of the House of Delegates without first obtaining the court's approval or even informing the Court that their actions were in were in violation of the Consent Decree.

The Department of Justice in its brief before Judge Lamberth depicts the situation as follows in response to Petitioner Palm's

comments opposing the modification of the Consent Decree: "the comments also contended the proposed modification of the Consent Decree reflects a change in the Department of Education interpretation of the 'separate and independent' requirement. They claim that the Department of Education has originally been of the view the decision-making role of the House of Delegates did not violate the 'separate and independent' requirement. As the Department of Education has explained, however, it was not until the Secretary reviewed the ABA in 1997-2000 that the Department of Education identified the problem with the ABA's compliance." DOJ stated earlier in its briefs that "the Department of Education did not understand, when it originally reviewed the Decree, that Section 6(a) required the House of Delegates to review and approve standards, interpretations and rules. The Department of Education did not, at that time, object to Section VI(a) of the final judgment which requires the ABA to subject interpretations and rules 'to the same public comment and review process and approval procedures that apply to proposed standards.' The parties intended this to mean that the House of Delegates would approve interpretations and rules as it had done for standards for many years. The Department of Education did not realize that this was the intent of Section IV(a)." See U.S. Memorandum in support of modification at 4-5. (emphasis added)

DOE then reinterpreted its regulations' requirement of "separate and independent" status so that the House of Delegates could no longer play its long-standing determinative role in accreditation matters. Complaint ¶17. DOE's action coincided with concerns by deans of many of the accredited law schools about the increased involvement of the re-energized House of Delegates including its reversal of Council recommendations. The ABA registered its official disagreement but meekly complied and did not even file an administrative appeal within DOE or seek judicial relief.

Relying on the extreme judicial deference accorded the Department of Justice in anti-trust consent decree matters, Judge Lamberth approved the Department of Justice's and ABA's jointly sought modification of the Consent Decree and refused to address Plaintiff's non-party arguments that the DOE's regulations are invalid. The District Court explained its limited role: But even if the arguments of Palm and other Commenters were much more

persuasive, the Court would not be bound to accept them. Rather, it is much the opposite. The Court is "bound to accept any modification that the [Antitrust Division] . . . reasonably regard[s] as advancing the public interest." *Western Elec. Co., 993 F.2d at 1576. United States v. American Bar Association*, 135 F. Supp.2d 28 (D.C. dist. 2001).

Then shortly after the modification, Petitioner filed this case in 2001.

D. Plaintiff Has Personally Raised Issues Seeking To Keep And Expand the House of Delegates' Role Before DOE, DOJ And In The Consent Decree Proceeding. DOJ Argued That Plaintiff Could Bring A Separate Action Challenging The Validity of the Regulations.

The Department of Justice in its brief in support of the modification of the Consent Decree and in response to the comments submitted by Petitioner Palm (then "Commenter Palm") argued that the anti-trust Consent Decree modification proceeding is not a proper place to address "the challenge to the propriety of the Department of Education regulations." The Department of Justice stated that the regulations may be challenge in a proceeding brought under the Administrative Procedure Act.

In the anti-trust action, when the Consent Decree was originally proposed, Plaintiff filed objections to the Consent Decree under the Tunney Act. At that time, Professor Palm was on the Council of the ABA and had come to believe that what was being done on the Council was improper and illegal and that the problem was in the "capture." Ultimately, Plaintiff along with Professor Robert Dinerstein of American University Law School met with the Department of Justice attorneys in an effort to understand more about how the Consent Decree was going to be enforced and both agreed to withdraw their objections. Plaintiff also relied on DOE's statements to the late Judge Richey as the basis of his objection to the Consent Decree.

Later Plaintiff spoke with DOE's Counsel for accreditation, Sally Wanner twice, and she assured him that House of Delegates' final

action on accreditation matters was not barred by the Higher Education Act or DOE's "separate and independent" regulations.

Thereafter, DOE staff had their sudden, belated realizations and abruptly changed their position on ABA governance. The Department of Education took the position that Petitioner was only entitled to make comments in the hearings on the ABA's continued recognition but that he would not be allowed to appeal the granting of the ABA's application through the ranks of the DOE as is provided for parties. As stated earlier, the ABA leadership did not appeal and acquiesced in the change in governance.

PROCEEDINGS IN THE DISTRICT COURT

Plaintiff filed his Complaint seeking a declaratory judgment that the Department of Education's regulations and interpretations requiring that the ABA have a "separate and independent" entity to conduct accreditation of law schools are invalid because they conflict with The Higher Education Act's "Grandfathering" provisions for pre-1991 accrediting bodies, like the ABA; and conflict with the statutory authorization for trade associations to be accrediting bodies; and exceeds the limited authority granted to DOE to regulate accreditation only for purposes of federal programs and not for other non-federal purposes.

The Secretary moved to dismiss for lack of standing. The district court granted the motion, concluding that the allegations in Plaintiff's complaint did not show injury in fact, causation, or redressability—the three elements of Article III standing that must be shown at trial. *Palm v. Paige*, The court noted that Petitioner had alleged only generalized grievances, such as his "general dissatisfaction with the validity of the regulations, their inconsistency with the [Higher Education Act], the Secretary's authority to impose their requirements and the manner in which the ABA adopted the changes to their accreditation process." *Ibid.* To the extent Palm alleged an injury to the ABA, the court determined that Palm lacked standing to assert an institutional injury on that organization's behalf. The court also held that Petitioner could not satisfy the causation requirement, because "the Council's substantive decisions on matters of accreditation do not flow from the Secretary's requirement that the Council be separate and

independent from the ABA." Finally, the court determined that the antitrust consent decree, which prevented the ABA from changing its accreditation procedure, meant that Palm's alleged injuries would not be redressed by a favorable decision. The court entered an order dismissing the complaint with prejudice but not dismissing the action.

Plaintiff filed a motion to reconsider the dismissal and for leave to file his First Amended Complaint. Judge Huvelle proceeded precipitously and denied the motion before Plaintiff's reply brief was even due to be filed. Plaintiff filed a motion to vacate the granting of the motion to reconsider. Judge Huvelle recognized that the earlier dismissal order was invalid because no separate judgment was filed as required by Federal Rule of Civil Procedure 58. Order of October 30, 2001. (Appendix) She also recognized that she had acted prematurely and allowed Plaintiff to file his reply brief in support of his motion to reconsider.

Since no judgment had been entered, Plaintiff sent to the Clerk his Amended Complaint As Of Right. But Judge Huvelle sua sponte refused to allow the Clerk of the District Court to file this Amended Complaint. Judge Huvelle denied Plaintiff's motion to reconsider and entered a new final order dismissing the case together with a separate judgment indicating again that the "Complaint was Dismissed with Prejudice," but added "This is a final appealable order."

Petitioner then filed his Notice of Appeal.

COURT OF APPEALS PROCEEDINGS

Shortly after the Notice of Appeal was filed, the Staff Attorney and the Clerk's Office designated this case for disposition without oral argument. The Staff Attorney and the Clerk's Office then set a schedule for briefs and indicated the recommendation of no oral argument by designation of "Oral Argument Not Yet Scheduled." Petitioner had no way to know this legend meant that the case was being assigned to a special panel that hears all cases designated for disposition without oral argument.

The Court affirmed and ruled that Plaintiff had to allege the three elements of Article III Standing required at trial. The Court also ruled that the District Court did not abuse its discretion in denying Plaintiff leave to file even one amended complaint. The Court did recognize that some of Plaintiff's interests would qualify as injuries in fact but claimed Plaintiff did not raise them below. Plaintiff had explicitly raised them below in his brief in Opposition to the Motion to Dismiss. The Court refused to consider these interests de novo or remand to allow Petitioner to file an amended complaint. The Court also ruled that Plaintiff lacked standing because the ABA's compliance with DOE's orders were independent actions of a third party not before the court and therefor, the chain of causation was broken and not established in the complaint. Petitioner's request for remand to amend his complaint to a derivative action on behalf of the ABA and/or to join the ABA as a party defendant was apparently denied although the Court did not address this request.

Petitioner then filed his Petition for Rehearing and Rehearing En Banc which argued that the Court misunderstood Petitioner's arguments about standing. Petitioner also raised his arguments that the process for disposition without oral argument, as set forth herein that makes important decisions before the Appellant is even scheduled to file a brief. The Court denied the Petition but filed a short statement indicating that the Judges on the Special Panel voted unanimously to deny oral argument but did not contest Petitioner's assertions about how the Staff Lawyer system works.

Petitioner found it difficult to determine how his case was processed because the Clerk's Office refused to provide more details about the system than those contained in the *Handbook of Practices and Internal Procedures*. The docket does not disclose the actions of the Staff Lawyer and the Special Panel. The Clerk's Office refused to disclose a copy of the contents of the Staff Lawyer's proposed disposition and draft final order.

ARGUMENT

I. THE COURT OF APPEALS' DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND THOSE OF OTHER CIRCUITS ON THE

IMPORTANT QUESTION OF THE PLEADING STANDARD TO ALLEGE ARTICLE III STANDING.

This case presents questions about what is sufficient at the pleading stage to show Article III Standing. The Petition for Certiorari should be granted to decide that this Court's decision in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed.2d, (Feb. 26, 2002) applies to Standing as well as employment discrimination claims. This Court's ruling in *Swierkiewicz* was that allegations of the elements of a prima facie case were not necessary in the complaint alleging a Title VII violation under federal notice pleading. The District Court's dismissal of the complaint was made before this Court decided *Swierkiewicz*. The District Judge ruled that Plaintiff must allege each element of Article III Standing with the specificity and certainty that would be required at trial or on summary judgment. The Circuit Court agreed that "[E]ven at the pleading stage, the allegations of the Complaint must meet the requirements for standing." Judgment p. 1, Appendix. This ruling directly conflicts with this Court's recent unanimous decision in *Swierkiewicz* as well as a line of other rulings by this Court.

The Circuit Court conflicts with the holding of *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) that "general allegations resulting from the defendant's conduct" are sufficient. 561 *Lujan* distinguished between plaintiff's burdens in the complaint and at the later stages of summary judgment and trial.

> At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial."

Lujan v. Defenders of Wildlife, 504 U.S. 555 at 561 (1992). Plaintiff's allegations show injury and causation because DOE used the challenged regulations to force the ABA to eliminate the House of Delegates as the decision-maker in accreditation matters.

The decision is also in conflict with *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) where Justice Scalia concluded that specificity of the type that is required at summary judgment to show standing is not required in the complaint. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court restated the limited pleading required in the complaint: "*Lujan*, since it involved the establishment of injury in fact at the summary judgment stage, required specific facts to be adduced by sworn testimony; had the same [standing] challenge to a generalized allegation of injury in fact been made at the pleading stage, it would have been unsuccessful." (emphasis added)

The net effect of the Circuit Court's misinterpretation of *Lujan* is to create a heightened pleading standard, one that conflicts with the regime of notice pleading established by the Federal Rules of Civil Procedure and recently rejected in *Swierkiewicz*. Such heightened pleading requirements should have been foreclosed since 1993 by *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993).

The Court of Appeals' decision also conflicts with many of this Court's cases that hold that a Rule 12(b) motion to dismiss "presumes that general allegations embrace those specific facts that are necessary to support the claim." In his recent unanimous Supreme Court opinion, Justice Thomas reiterated the Court's position that Federal Rule of Civil Procedure 8(a) only requires general factual statements that can fairly be read to include more specific facts. *Swierkiewicz v. Sorema N.A.*, 2002 LEXIS 1734, 70 U.S.L.W. 4152 (February 26, 2002). He recognized again that the Federal Rules anticipate that discovery will unearth relevant facts and evidence and that "simplified notice pleadings relies upon liberal discovery rules and summary judgment motions to define disputed facts and issues to dispose of unmeritorious claims" *Id* at 12. This judicial expenditure of resources at the complaint stage is wasteful and unfair to Plaintiff who has not yet had the benefit of discovery to develop his proof of "causation" and "redressability."

This Court should decide this case to make clear that *Swierkiewicz* applies to standing and that allegations of injury and a causal link are sufficient at the motion to dismiss stage to show standing. Summary action by this Court to reverse and remand for reconsideration in light of *Swierkiewicz* would be an appropriate alternative in this case.[1]

A. The Decision Below Conflicts With Decisions Of The Seventh, Eighth Ninth and Tenth Circuits. The Third Circuit Agrees With The D.C. Circuit. The Second Circuit Agreed With The D.C. Circuit In Part And Disagreed In Part.

The Court of Appeals' Judgment conflicts with other circuits which have recognized the distinction between the requirements for proof of summary judgment and allegations of injury in the complaint to show standing. In the Seventh Circuit's *South Austin Community Council v. SBC Communications Inc.*, 274 F.3d 1168 (7th Cir. 2001), Judge Easterbrook's opinion reminded the district court that preemptive screening upon motions to dismiss in terms of their specificity "has nothing to do with standing." He continued, "Complaints need not be elaborate, and in this respect injury (and thus standing) is no different from any other matter that may be alleged generally." At 1170. Rather than screen complaints in light of their likelihood of success on the merits, courts must, upon motions to dismiss, "follow the norm that a complaint is sufficient if any state of the world consistent with the complaint *could* support relief." At 1171 (emphasis in original). Or, as Judge Easterbrook explained in a recent case, so long as it is possible to "imagine facts consistent with [the] complaint . . . that

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[1] As late as October 21, 2002, this Court granted certiorari and remanded a case to the First Circuit for reconsideration in light of *Swierkiewicz*. *Rucker v. Potter*, _____ U.S. _____ 123, S.Ct. 465, 154 L. Fd.2d 327, 2002 U.S. LEXIS 7784 (Oct. 21, 2002). On June 17, 2002 certiorari was granted and a remand ordered to the Ninth Circuit for reconsideration in light of *Swierkiewicz*. *O'Connor v. Northshore International Insurance Services, Inc.*, _____ U.S. _____, 122 S.Ct. 2584, 153 L. Ed.2d 774, 2002 U.S. LEXIS 4452 (June 17, 2002)

will allow Plaintiff standing, . . . no more is required." *Alliant Energy Corp. v. Bie*, 277 F.3d 916, 920 (7th Cir., 2002). (emphasis added)

After this Court's decision in *Swierkiewicz*, the Seventh Circuit has maintained its liberal interpretation of allegations of standing under *Swierkiewicz* to reverse dismissal of a complaint. *Payton v. County of Kane*, 308 F.3d 673 (7th Cir. 2002).

Moreover, the Judgment conflicts with a recent Tenth Circuit decision which relied on *Now v. Scheidler*, 510 U.S. 249, 256 holding that allegations of injury are sufficient to show standing at the pleading stage. *Robbins v. Wilkie*, 2002 U.S. App. LEXIS 17286 (10th Cir., August 21, 2002).

In *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002) the Ninth Circuit relied on *Swierkiewicz* to reverse a district court's dismissal for lack of sufficient allegations of concrete injury and proximate causation to show Article III Standing and standing for RICO claims. The Eighth Circuit in *Gardner v. First American Title Insurance Co.*, 293 F.3d 991 (8th Cir. 2002) reversed a dismissal of a complaint and held that *Swierkiewicz* applies to standing even if standing is part of jurisdiction that must be pleaded under Federal Rule of Civil Procedure 8(a)(2). This ruling is in direct conflict with the D.C. Circuit Court of Appeals ruling below.

On the other hand, in *Pryor v. National Collegiate Athletic Association*, 288 F.3d 548 (3rd Cir. 2002) the Third Circuit has recently agreed with the D.C. Circuit that allegations of injury are not sufficient but that "Constitutional standing requires pleadings that show . . . "the three elements of a legally recognized injury; causation and that a favorable decision will likely redress the injury. The Court refused to allow a more generous notice pleading standard even standing for a declaratory judgment to allow those in conflict to reorder actions in light to the Court's ultimate ruling on the merits. Here, a ruling that DOE's actions with respect to the ABA are invalid and illegal will allow many of the actors involved to reassess their position. Plaintiff will certainly take actions as a member of the ABA to have the House of Delegates take back its power.

The Second Circuit in *Taylor v. Vermont Department of Education*, 2002 U.S. App. LEXIS 26431 (2nd Cir. 2002) used *Swierkiewicz* to reverse a dismissal of one count on standing but undercut its notice pleading standard by affirming dismissal of several other counts for lack of standing.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH MANY OF THIS COURT'S DECISIONS ABOUT WHAT CONSTITUTES INJURIES IN FACT FOR ARTICLE III STANDING AND WHETHER IT IS SUFFICIENT THAT PLAINTIFF ALLEGE THAT HE HAS BEEN DENIED AN OPPORTUNITY BECAUSE OF THE GOVERNMENT'S ILLEGAL CONDUCT.

Petitioner's interests are similar to "aesthetic and economic interests" recognized by the Supreme Court for standing. Any member of the ABA has suffered direct injury sufficient for standing. Increasing financial liability for future anti-trust violations together with the interest of a member in maintaining the integrity of the Association are sufficient to create standing under Supreme Court cases. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 185-186 (2000) the test for standing was whether the individual person has in some way been injured directly by the pollution that was being attacked. The Court found "recreational, aesthetic and economic" interests sufficient. It was a sufficient showing that one Plaintiff would no longer use the waterway because of its being polluted and another Plaintiff stopped fishing there. Other Plaintiffs stopped picnicking, walking, and bird watching there because of their aesthetic concerns with the polluted environment. Likewise here, Plaintiff's interest in participating in the political process to reform legal education through accreditation has certainly waned in light of the change in the power structure and its adverse effect on his efforts.

The Circuit Court's decision is contrary to this Court's vote dilution cases in which this Court found sufficient injury in fact for purposes of standing. In the landmark reapportionment case, *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court held that

voters are asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes. In *Clinton v. City of New York,* 524 U.S. 417 (1998), the census case, this Court ruled that "this expected intra-state vote dilution satisfied the injury in fact, causation and redressability requirements." But here Plaintiff's situation is not just similar to those who would lose one Seat, it is worse because all voting seats in the House of Delegates were lost with respect to voting on accreditation matters. This issue (accreditation) has been reapportioned out of the House of Delegates' purview by DOE action. This case is like an equal protection violation when the legislature gerrymanders a district to benefit their party. It is enough for standing for a voter to show the loss of voting power. It is not necessary for standing to show that one will win elections. All that needs to be shown is that one's vote has been diluted. It is sufficient to show that one group took power at the expense of another group. Here, DOE required that voting power be taken from ABA members who elect House of Delegates members and given to the regulated law schools' faculty and deans who, as group members of the Legal Education Section, elect the Council members. This is a gerrymandering case by Order of the Department of Education. Plaintiff is a member of the group that was disenfranchised and therefore has Article III Standing.

The Court of Appeals' decision conflicts with Supreme Court decisions that hold that adverse impact upon one's bargaining position is sufficient injury to show standing. *Clinton v. City of New York,* 524 U.S. 417 (1998). Here, Plaintiff and his allies may not succeed in their efforts to improve legal education through the House of Delegates. But successes had been achieved in the past both on the floor of the House of Delegates and through negotiating with the Council while accreditation matters were before the House or while the Council was developing positions to present to the House.

All of these considerations were raised in the Complaint and argued in the briefs and will be established at trial to show standing. Indeed, the very effort to return the House of Delegates to power after Plaintiff wins this case, may well result in bargaining for a broader governance role for those of the Bench and Bar not in the controlling "capture" group. The DOE's action

has resulted in a dilution of Plaintiff's and other ABA members votes in electing the House of Delegates to control the Council and the Section. As a result of DOE's actions, a "separate and independent" subdivision makes the decisions in the name of the ABA but without the usual control of the House of Delegates, the Board of Governors or the ABA President.

But the Court of Appeals concluded that Appellant's injuries were caused by independent action of a third party (the ABA) not before the court. This position is contrary to the meaning of independent action and the generous reading that should be given to complaints in alleging causation. Discovery may establish the content of the several closed and secret meetings held between ABA leaders and the top officials in the Clinton Administration at DOE and DOJ. In drawing such a conclusion, the Circuit Court does not address the allegations that DOE ordered the ABA to make the changes or that all accrediting power would be lost and the Secretary so stated in writing. DOE's actions were the precipitating cause of the ABA's changes. Had DOE not issued its order, the 45-year governance structure would have remained in place.

The failure of the ABA leadership to take even an administrative appeal within the Department of Education and not seek judicial review challenging the legality of the regulations suggests an understanding was reached between the ABA leadership and DOE to use the regulations as a pretext for returning control to the "captured" Council. This is especially likely because the ABA's outside counsel, Sidley & Austin, had advised the ABA that the regulations at issue were invalid. Yet the ABA did not challenge them vigorously or even advise the Court of their opinion during the modification proceeding. But this possible collusion must await discovery. The failure of the ABA or DOE or DOJ to even advise the Court before it made its changes to eliminate the House of Delegates indicates that secrecy and a fait accompli were part of the tactics. Instead the government and the ABA just violated the Decree until their conduct was challenged and they then DOJ and the ABA agreed to put the "sweetheart" governance position arrangement into the Consent Decree sought a modification of the Consent Decree. The Circuit Court's narrow construction of causation in this case forecloses a dissident minority from seeking

to eliminate illegal requirements imposed by the federal government that dilute the voting strength of the minority.

The Department of Education did indeed "cause" Appellant's injuries through its coercive actions when it ordered the ABA to eliminate the House of Delegates as the decision-maker in law school accreditation matters. The Court of Appeals' decision is contrary to *Bennett v. Spear*, 520 U.S. 154 (1997) which held that such regulatory coercion is sufficient to establish standing.

The Circuit Court's decision further requires that Petitioner guarantee that the ABA House of Delegates would retake its previous governance power for accreditation matters. But an ex ante guarantee of success violates this Court's cases and is not the correct standard for ascertaining the possibility of redress. Several of this Court's cases *Northeastern Fla. Chapter of the Associated General Contractors of America v. Jacksonville*, 508 U.S. 656 (1993); *Clinton v. City of New York*, 524 U.S. 417 (1998); *Baker v. Carr*, 369 U.S. 186 (1962); and *Regents of Univ. Cal. v. Bakke*, 438 U.S. 265 (1978) establish that absolute certainty of Plaintiff's eventual victory in restoring the ABA's accreditation procedures is not required to satisfy the element of redressability.

III. PLAINTIFF'S ALLEGATIONS SHOWED MANY DIFFERENT INDIVIDUAL AND PERSONAL INTERESTS THAT SHOULD BE SUFFICIENT INJURIES AT THE INITIAL COMPLAINT STAGE BEYOND THOSE OF JUST ANY MEMBER OF THE PUBLIC.

Petitioner has alleged many different interests that individually or when combined together establish standing. Petitioner suffered each of the following injuries within the allegations in the complaint and were argued below.

1) Plaintiff's vote as an ABA member has been diluted. The House of Delegates' role has been diminished. On the other hand, DOE's action increased the role of the Council elected by faculty and deans of the accredited schools so that the strength of the votes of Petitioner and other members of the bench and bar who elect House of Delegates has decreased.

2) As a political leader in the ABA, Plaintiff relied on DOE's prior position to help fashion and execute the strategy and tactics for presenting to the House of Delegates reforms of legal education and the accreditation process conducted in the name of the ABA.

3) Any ABA member may well face increased dues to pay attorneys fees and damages for future anti-trust violations committed by the Council;

4) The ABA members' interest in maintaining the integrity of checks on and oversight of the Council in the ABA's governance structure;

5) Plaintiff's professional concerns as a lawyer and law teacher in improving the legal profession and law school preparation of lawyers;

6) Plaintiff has shown his direct, personal interest in the ABA's accreditation process in the past and is currently presenting to the Council proposed improvements in accreditation standards.

7) Plaintiff has tried repeatedly to obtain a decision that the House of Delegates can retain its 45-year decision-making authority for accreditation. Repeatedly he was told that he must pursue his claims against DOE in court. Petitioner followed those repeated suggestions by Government employees.

8) Plaintiff withdrew his objection to the Consent Decree in reliance upon DOE's position expressed to the Court that the Consent Decree's House of Delegates' role complied with DOE's "separate and independent" requirements.

9) Plaintiff appeared at nearly all, if not all, of the DOE hearings held to determine whether the ABA's Council should continue to be recognized as an accrediting body and presented his objections about the dangers created by eliminating the House of Delegates' final decision-making role in light of the "capture" of the Council which led to the Consent Decree. But DOE advised him that he could not raise an appeal within DOE.

The prohibition at issue in this case is one on how the ABA governs itself and not on what activities it can engage in. Precisely because DOE's regulations diminish the power of an ABA member's vote and alters the balance of power, Petitioner has a direct interest in stopping dilution of his vote. The effect of DOE's actions has been that the House of Delegates now has less power than it formerly did. There is nothing "hypothetical" about that diminishment of power. Moreover, as apportionment cases clearly show, vote dilution is a concrete injury in fact, regardless of the conjectural issue of whether or not the affected voters would constitute a winning plurality.

Before he left the University of Chicago Law School, Petitioner had been a Professor there for thirty (30) years. He had served as a member of the Council and the Accreditation Committee and is still playing a vigorous and active role in accreditation matters, especially in efforts to expand clinical education to meet the student demand at law schools. Evidence will show beyond dispute that Petitioner has been one of a handful of clinical teachers who lead clinical teachers on accreditation issues. Indeed, DOE was forced by the truth of Plaintiff's extensive leadership in the ABA to begrudgingly acknowledge in its brief below that Plaintiff has had a much greater direct involvement than a member of the general public.

The invalid regulations under attack are aimed directly at minimizing the involvement of the practicing bar and judges through the House of Delegates in accreditation matters. DOE's "unexpected" reinterpretation of the facts and its regulations occurred after the Illinois State Bar Association, of which Petitioner is an active member, and other groups sought to reform the accreditation standards and the ABA's accreditation operations through the House of Delegates.

Plaintiff has a fiscal interest as an ABA member in preventing future expensive wrongdoing by the Council and its Accreditation Committee. As a member of the ABA, among Plaintiff's interests is a fiscal one-to avoid increased dues and cutbacks in membership services in order for the ABA to pay legal fees and judgments for the "separate and independent" Council. DOE's position prohibits each and every one of the governing bodies of the ABA, (the

House of Delegates, the Board of Governors and the President) from supervising the functioning of the Council. This situation gives the "captured" Council carte blanche to run amock. In turn, DOE's requirements have greatly increased the likelihood that the "capture" group will commit violations of anti-trust laws and provide improper and even illegal discriminatory treatment of new schools, non-academic faculty members and those who challenge the Council's rulings through appeal to in court. ABA members have a direct interest in avoiding future liability for judgments and attorneys fees for on-going and future anti-trust violations and violations of other laws.

The current corporate structure required by DOE is irrational because it puts the regulated schools directly in control of the regulatory process. This is far worse than the indirect process of special interest lobbying and the revolving door of retired regulators being hired by the regulated (which occurs with professional staff of the Section anyway). This situation is far worse because the regulated law schools use the ABA as a front so they can maintain the false appearance of outside regulation. But the accredited law schools and their academic faculty are actually making the decisions about the entry of new competitor schools and under what terms and conditions their own schools and competitor schools will operate. Petitioner is injured by the appearance, as well as the actual existence, of corruption, conflicts of interest and illegal conduct. Petitioner should be allowed to obtain correction of these injuries for his good, the good of other ABA members and the good of legal education.

IV. THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER BECAUSE THE COURT OF APPEALS DECIDED NOT TO GIVE FULL REVIEW WTH ORAL ARGUMENT BEFORE THE FIRST BRIEF WAS EVEN DUE TO BE FILED.

The staff lawyer system used by the Court of Appeals for the District of Columbia violates Appellant's rights to a fair and equal appellate review under Due Process, Equal Protection, Article III and the Federal Rules of Appellate Procedure by prematurely deciding to assign the case to a "special" panel that decides cases designated for disposition without oral argument. That decision is

made before Appellant even files his opening brief. The Staff Lawyer also prepares a proposed final order for the Judges. This Court should consider whether the D.C. Circuit's internal procedures violate these rights.

As a legal aid lawyer for thirty (30) years, Petitioner has confronted governmental efforts to cut back on making decisions on the merits of each individual claim and efforts to triage justice. The effort is made in good faith but too often results in injustice for individuals who lose by application of a triage profile. One of those cases that Petitioner litigated was *Logan v. Zimmerman Brush Co.*, 433 U.S. 422 (1982). This Court held that termination of a cause of action is a deprivation of property that must meet the standards of due process. All nine justices found that decisions terminating cause of actions must allow the Plaintiff to present his arguments and evidence before a decision is made. It was unacceptable and arbitrary to use the expiration of processing time limits not caused by Plaintiff as a measure of the merits and was found to be unconstitutional. As legal services programs have been drastically underfunded, more and more litigants must proceed on a pro se basis. What they encounter is not a fair and equal process but a profiling and triage system that determines who gets the judicial ration of full and fair consideration by the decision-maker. It is ironic that even Petitioner falls victim to this unjust system. Pro se litigants, like Petitioner, are entitled to better than they now receive and this Court should grant certiorari to determine that making even a recommended decision before any briefs have been filed is wrong.

The Circuit Court has a special panel that hears all cases designated for possible decision without oral argument. This triage decision is made based only upon the district court's decision below and includes a proposed dispositional order prepared by the Staff Lawyer. The D.C. Circuit has set up its own system of selective review like the certiorari system used by this Court except it did so without Congress' authorization.

The criteria for disposition without oral argument are stated as follows:

Rule 34(j) Dispositions

> Among the factors the Court considers are: (1) whether the appeal is frivolous; (2) whether the dispositive issue has previously been authoritatively decided; and (3) whether the facts and legal arguments are adequately presented in the briefs and record so that oral argument would not significantly aid the decisional process. The decision to dispense with oral argument must be unanimously made by a three-judge panel. *Handbook of Practices and Internal Procedures* at 48.

How can these criteria be addressed by the Staff Lawyer before the briefs are filed. Even beginning the analysis before the necessary documents are due to be filed is a sick joke and irrational. This Court should make clear that all litigants are to be given equal consideration based upon their arguments and not before they are even scheduled to make their arguments. This Court would not make its decisions about certiorari based only upon a Notice of Appeal without allowing the filing of a Petition for a Writ of Certiorari. Failure to consider the Appellant's brief is unfair, leads to a bias in favor of affirmance and has insufficient relationship to the merits for appellate review of the lower court decision. The writing of the proposed order and assigning the case to a special panel for non-oral argument dispositions before the first brief is filed do not meet even the lowest rationality standards for deciding cases and conflicts with this Court's decision in *Logan v. Zimmerman Brush Co.*, 433 U.S. 422 (1982). This triaging may serve the interests of expediency but it does not serve the interests of justice with even the appearance of fairness.

The decision to decide this case without oral argument was made initially before any briefs were even filed. According to the D.C. Circuit's *Handbook Of Practice And Internal Procedures,* "[I]n civil cases, oral argument dates and panels are usually set before the briefs are filed . . . ." (emphasis in original) Section IV (A)(3). There is a special panel that considers and decides cases recommended for disposition without oral argument under Circuit Rule 34(j):

Section XI(c)(2).

> The Court's Case Management Plan is designed to identify early in the appellate process cases suitable for disposition without oral argument under Circuit Rule 34(j). When a staff attorney screens a new appeal and concludes that Rule 34(j) treatment may be appropriate, that screening recommendation goes to the Clerk's Office, and a briefing schedule (but no oral argument date) is set. The staff attorney then reviews the briefs, and if he or she concludes that the case should be disposed of without oral argument, the staff attorney recommends to the special panel that it decide the case on the merits, pursuant to the Rule. The staff attorney also proposes a disposition, embodied in a draft judgment and, where appropriate, an accompanying memorandum.

The D.C. Circuit's procedures for disposing of a high volume of appeals by dispensing with oral argument and relying on a recommended decision of a single staff lawyer is improper. It violates Due Process and Equal Protection (1) because this system classifies cases and prepares the dispositional order for cases that are decided without oral argument before the briefs are even filed; (2) invades the role of Congress in setting up additional judgeships and in creating a certiorari style case selection process; 3) delegates judicial duties to non-Article III judges if more judges are needed, Congress should act; (4) gives undue incentives to dispose of cases expediently rather than fairly; (5) provides for different classes of cases and is used more extensively to screen pro se cases than other cases; and (6) violates Due Process requirements by not providing the recommended decision to counsel for filing of exceptions, as is done for magistrates in the District Court and for administrative law judges in administrative agencies.

This Court has repeatedly recognized that the decision-maker in litigation cannot have other interests that conflict with fair and impartial decision-making. The emphasis on efficiency in the Staff Lawyer's work and that of the "special panel" creates this very conflict that violates principles recognized in *Connolly v.*

Georgia, 429 U.S. 245 (1977) and *Marshall v. Jerrico, 446 U.S. 238 (1980).*

Petitioner presented the following challenging questions in his Petition for Rehearing En Banc along with the other arguments set out here.

> "Appellant seriously questions whether the judges assigned to his case provided the same close scrutiny and deliberate review that they give to matters that are given oral argument. Were Chambers Clerks used to review the briefs and cases cited? Was a bench memo prepared? Did all three judges read the briefs thoroughly?

The D.C. Circuit took up the challenge only in part when it said:

> **ORDERED** that the petition be denied. Insofar as appellant argues the court improperly relies on staff attorneys to screen cases for suitability for oral argument and decide unargued cases, he should be aware that a case can be decided without oral argument if three judges unanimously vote to do so. D.C. Circuit Handbook of Practice and Internal Procedures 49 (2002). Moreover, it is a panel of three judges that actually decides the case. Order of Denial of Rehearing En Banc, Appendix.

Casting votes is not the same as fully reviewing the record and the briefs. Nor did the Circuit Court dispute Petitioner's claims about how the Staff Lawyer system works.

V. THE CIRCUIT COURT'S JUDGMENT VIOLATED THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS OF LIBERAL ALLOWANCE OF AMENDMENT OF PLEADINGS IN NOT ALLOWING PETITIONER TO FILE EVEN ONE AMENDED COMPLAINT.

The Circuit Court concludes that Judge Huvelle's decision to deny Petitioner leave to amend his original complaint even once was proper, given that such amendment "would not have cured the deficiency" of standing.

The only specific arguments of Petitioner that the D.C. Circuit's judgment actually mentions are those relating to his concrete fiscal and aesthetic interests damaged by the Department of Education's regulatory shift. However, the judgment does not address those arguments but dismisses them with the grossly mistaken conclusion that Petitioner did not raise them below. In fact, Appellant did raise these arguments below. In his response to the Government's motion to dismiss, Appellant expressly cited *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 120 S.Ct. 693 (2000) in support of the proposition that "fiscal, aesthetic and recreational interests" such as those described in the initial complaint, do satisfy the requirements of standing. He explicitly set out his concerns about increased costs to the ABA and his interests in improving legal education. Memorandum in Response to Defendant's Motion to Dismiss 11-14, Appendix.

Both courts insisted that even at the pleading stage a plaintiff must establish absolute and direct causal linkages between regulatory actions and injury, and that redress will absolutely result in a return to the status quo before the agency's action and is not just a preponderant or highly likely possibility. The Circuit Court required an unduly high level of certainty of redress by upholding the district court's refusal to allow Appellant to file even one amended complaint. This is contrary to established law that "[a] dismissal with prejudice is warranted only when a trial court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency" *Firestone v.* Firestone, 76 F.3d 1205 (D.C. Cir. 76 F.3d at 1209. (internal quotations omitted.)

Plaintiff should have been granted leave to file an amended complaint under the liberal provisions of Federal Rule of Civil Procedure 15(a), providing that leave to amend "shall be freely given when justice so requires." Judge Huvelle erred in ruling that Plaintiff would only be allowed to amend his complaint to allege facts unknown to him when he filed his original complaint. Such is not the law and is contrary to Rule 15's requirement of liberal amendment of the complaint. Fed. Rules of Civil Procedure, Rule 15.

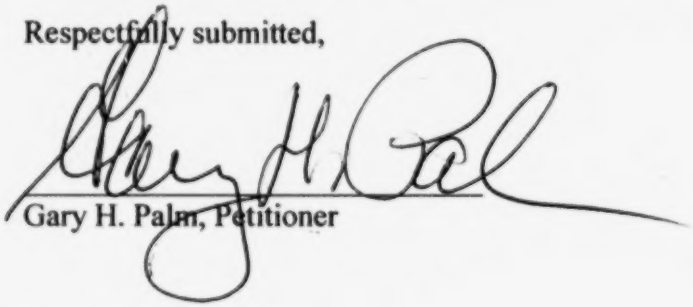
DOE in its Appellee's brief did not dispute Plaintiff's argument under Rule 15(a) but justified foreclosing any amendment because it argued that DOE and its lawyer could not imagine any facts that Plaintiff could allege that would show standing. Since DOE recognized the de novo nature of review of a dismissal which also includes any facts that can be imagined from the facts alleged in the complaint, the Circuit Court should have considered Petitioner's arguments about fiscal and aesthetic injuries. This is especially true because the Circuit Court itself recognized that concerns about dues increases and cutbacks in services might well be injuries in fact had they been alleged more clearly below. The case should have been remanded to allow Plaintiff to amend the complaint at least once especially since Plaintiff raised these arguments in his briefs in the District Court. (Appendix)

This case should also be remanded to allow Plaintiff to file an Amended Complaint as a derivative action against DOE or to join the ABA as a party Defendant. For the first time in its brief in the D.C. Circuit, DOE suggested that Plaintiff should bring a derivative action in state court against the ABA. By definition, a derivative action is brought by a member on behalf of the organization against a third party (like the Secretary of Education). But since DOE and Judge Huvelle both agree that the ABA would have standing, then Plaintiff would have standing to act on behalf of the ABA in a derivative action. Judge Huvelle had ruled that the fact that "the ABA may have standing as an institution to allege injury caused by the Secretary's regulations does not mean that a lone member, such as Plaintiff, has the authority to allege institutional injury on its behalf." Apparently, DOE takes a different view than Judge Huvelle with respect to a derivative action under Federal Rules of Civil Procedure Rule 23.1. Plaintiff requested that the D.C. Circuit remand so that he could amend his complaint to make a derivative claim as well. DOE's suggestion justified a remand for a derivative action in federal court since a lone member has the authority to maintain a derivative action on behalf of the American Bar Association. Petitioner also requested a remand to join the ABA as a defendant.

CONCLUSION

Petitioner requests that the Petition for Writ of Certiorari be granted and this case be heard and decided on the merits. In the alternative, Petitioner requests that the Court take summary action to remand the case for reconsideration in light of *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed.2d, (Feb. 26, 2002) and to remand for Petitioner to file an amended complaint.

Respectfully submitted,



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